



0000052544

N

ORIGINAL

1220

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN

JIM IRVIN
COMMISSIONER

MARC SPITZER
COMMISSIONER

2002 AUG 16 A 11:08

AZ CORP COMMISSION
DOCUMENT CONTROL

JOINT APPLICATION OF ACSI LOCAL
SWITCHED SERVICES, INC. D/B/A E.SPIRE
AND AMERICAN COMMUNICATION
SERVICES OF PIMA COUNTY, INC. D/B/A
E.SPIRE AND XSPEDIUS MANAGEMENT CO.
SWITCHED SERVICES, L.L.C., AND
XSPEDIUS MANAGEMENT CO. OF PIMA
COUNTY, L.L.C. FOR EXPEDITED APPROVAL
OF (i) THE TRANSFER OF SUBSTANTIALLY
ALL OF THE ASSETS, INCLUDING THE
CUSTOMER CONTRACTS, OF THE E.SPIRE
OPERATING ENTITIES TO THE XSPEDIUS
OPERATING ENTITIES; (ii) THE
DISCONTINUANCE OF TELECOMMUNI-
CATIONS SERVICES IN ARIZONA BY THE
E.SPIRE OPERATING ENTITIES

IN THE MATTER OF THE APPLICATION
OF XSPEDIUS MANAGEMENT CO. OF
PIMA COUNTY, L.L.C. FOR A
CERTIFICATE OF CONVENIENCE AND
NECESSITY TO PROVIDE INTRASTATE
TELECOMMUNICATIONS SERVICES

IN THE MATTER OF THE APPLICATION
OF XSPEDIUS MANAGEMENT CO.
SWITCHED SERVICES, L.L.C. FOR A
CERTIFICATE OF CONVENIENCE AND
NECESSITY TO PROVIDE INTRASTATE
TELECOMMUNICATIONS SERVICES

Docket No. T-04112A-02-0450
T-04113A-02-0450
T-03411A-02-0450
T-03597A-02-0450
(Consolidated)

Arizona Corporation Commission

DOCKETED

AUG 16 2002

DOCKETED BY

CAR

Docket No. T-04112A-02-0451

Docket No. T-04113A-02-0452

EXCEPTIONS OF XSPEDIUS OPERATING ENTITIES

Xspedius Management Co. Switched Services, L.L.C. and Xspedius Management
Co. of Pima County, L.L.C. (together "Xspedius Operating Entities") submit their

1 exceptions to the Recommended Opinion and Order.

2 The Xspedius Operating Entities take exception to a single condition related to the
3 transfer of assets – the requirement that customers whose service is being transferred from
4 the e.spire Operating Entities to the Xspedius Operating Entities be allowed “to elect . . . to
5 continue or discontinue service at their discretion, without prejudice or regard to contractual
6 obligation.” [Recommended Opinion and Order at 13:10-12] The Xspedius Operating
7 Entities object to this requirement (the “Fresh look” requirement) for several reasons.

8 First, the service contracts at issue are valuable assets that were purchased through
9 the bankruptcy court auction and sale. Those contracts are an important factor in the
10 Xspedius Operating Entities’ operations in the Tucson market where it will be providing
11 service. Indeed, the physical assets, without the customers served over them, have
12 significantly less value to the purchaser. The customers in question took literally years for
13 e.spire to accrue. If one-third or one-half were to take advantage of the opportunity to
14 escape from their contracts, it could take several years more for Xspedius to return to the
15 same level of customers. By allowing customers to ignore their contracts, the Commission
16 will create a situation where the Xspedius Operating Entities may suffer significant
17 economic hardship. Such hardship may interfere with the Xspedius Operating Entities’
18 ability to fully compete in the market and will harm competition in the Tucson.
19 Importantly, the Xspedius Operating Entities intend to serve *all* e.spire customers. They
20 will not “cherry-pick” only the more profitable customers. Therefore, this situation is
21 significantly different from the single instance in which this “fresh-look” requirements was
22 previously imposed;¹ there, the new CLEC intended to drop certain customers. Because the
23 Xspedius Operating Entities will continue to serve *all* contract customers, it should receive
24 the benefit of all those contracts. Moreover, the customers signed the contracts expecting to
25

26 ¹ This “fresh look” requirement apparently has been applied in only one other telecom-
27 munications asset transfer of which applicants are aware. [See Decision No. 64740 (April 17,
2002)]

1 be bound by the term of the contracts. Customers will continue to receive the same services
2 at the same rates under the transferred contracts. [See Proposed Opinion and Order,
3 Findings of Fact ¶¶ 8, 24] Indeed, Xspedius is obligated to meet those service obligations
4 under the contracts. If the Xspedius Operating Entities fail to meet those contractual
5 obligations, the customers will be free to switch companies.

6 Second, the operational uncertainty created by this "fresh look" period will interfere
7 with the stability of Xspedius Operating Entities' business operations. As noted in the
8 Recommendation Opinion and Order, it is important for Xspedius to be able to plan its
9 operations to able to provide continuous and reliable service to its customers following the
10 transfer of assets. The "fresh look" requirement throws a large monkey wrench into those
11 plans. The Xspedius Operating Entities will not be able to determine their operational
12 support needs until after the "fresh look" period passes. That uncertainty may delay
13 necessary operational changes. It may also jeopardize employment opportunities at the
14 Xspedius Operating Entities – particularly if many customers leave.

15 Third, this requirement was not imposed on a key competitor in the Tucson market –
16 Time Warner Telecom – when it purchased GST's assets. [See Decision No. 63262
17 (December 14, 2000)] Discriminatory treatment between two competitors – both of whom
18 have made investments in infrastructure to provide service – is inappropriate. This is
19 particularly true in this case where Time Warner was not subject to this requirement, but
20 will reap the benefits of the disparate treatment afforded Xspedius because it can now
21 attempt to lure Xspedius customers away to obtain service off of the assets it recently
22 purchased from GST.

23 In sum, the Xspedius Operating Entities submit that the "fresh look" requirement is
24 not in the overall public interest because: (i) it interferes with the competitive market; (ii) it
25 creates unnecessary instability for Xspedius and its employees; and (iii) it is discriminatory.

26 ...

27 ...

1. THEREFORE, the Xspedius Operating Entities request the Recommended Opinion
2. and Order be amended: (i) by deleting Paragraphs 33 and 36 of the Findings of Fact and (ii)
3. by deleting the last sentence of the ordering paragraph on page 13.
4.

5. RESPECTFULLY SUBMITTED August 16, 2002.

6. ROSHKA HEYMAN & DEWULF, PLC

7.
8. By



9. Michael W. Patten
10. One Arizona Center
11. 400 East Van Buren Street, Suite 800
12. Phoenix, Arizona 85004
13. (602) 256-6100

14. Brad Mutschelknaus
15. Enrico C. Soriano
16. Leila M. Baheri
17. KELLEY DRYE & WARREN LLP
18. 1200 19th Street, N.W., Fifth Floor
19. Washington, D.C. 20036
20. (202) 955-9866

21. Attorneys for ACSI Local Switched Services,
22. Inc.; American Communication Services of Pima
23. County Inc.; Xspedius Management Co. Switched
24. Services, L.L.C.; Xspedius Management Co. of
25. Pima County, L.L.C.

26. ORIGINAL + 10 COPIES of the foregoing
27. filed August 16, 2002, with:

28. Docket Control
29. ARIZONA CORPORATION COMMISSION
30. 1200 West Washington
31. Phoenix, Arizona 85007

ROSHKA HEYMAN & DEWULF, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

ROSHKA HEYMAN & DEWULF, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

COPIES of the foregoing hand-delivered
August 16, 2002, to:

Teena Wolfe, Esq.
ALJ, Hearing Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 8500

Jason Gellman, Esq.
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 8500

Ernest Johnson, Esq.
Director, Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 8500

